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IN THE

SUPREME COURT OF THE UNITED STATES

April Term, 1971

No. 1530

ROBERT ELVIN,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, ROBERT ELVIN, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York.

OPINIONS BELOW

There was no opinion in the District Court, and the Court of Appeals affirmed the judgment of the District Court without opinion in open court.

JURISDICTION

The date of the judgment sought to be reviewed is March 2nd, 1971. It was entered the same date.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, Section 1254, United States Code.

QUESTIONS PRESENTED

1. Did not the Trial Court commit prejudicial error requiring reversal of the judgment of conviction by permitting the Government over petitioner's objection to cross-examine his character witnesses about

alleged charges against petitioner of conspiracy, filing false tax returns with Internal Revenue Service, and that he was barred from various racetracks, without preliminary inquiry in the absence of the jury as to the truth, nature, materiality and probative value of such cross-examination?

2. Did not the Trial Court commit prejudicial error requiring reversal of the judgment of conviction when it failed to grant petitioner's motions for a mistrial based upon such cross-examination of his character witnesses?

3. Did not the Trial Court commit prejudicial error requiring reversal of the judgment of conviction by its failure to instruct the jury during the cross-examination by the Government of petitioner's

character witnesses, and in its charge to the jury, of the limited nature and purpose of such cross-examination?

4. Did not the Trial Court by permitting the Government over petitioner's objection to cross-examine his character witnesses as hereinabove set forth, and by its failure to instruct the jury during said cross-examination, and in its charge to the jury, of the limited nature and purpose of such cross-examination deprive petitioner of due process of law and a fair trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment so far as it is applicable to the petitioner and this application, provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime,***,

> nor be deprived of life, liberty, or property, without due process of law;"

Title 18, U.S.C., Section 1621, provides as follows:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 nor imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Title 28, U.S.C. Section 2111, provides as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment

> after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 52 of the Federal Rules of Criminal Procedure, provides as follows:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was charged in a one count indictment with perjury in his testimony before a Federal Grand Jury for the Southern District of New York in violation of 18 U.S.C. 1621.

He was tried to a jury on July 27, July 28, July 29, July 30 and July 31, 1970, and

was found guilty as charged. On September 15, 1970, he received a sentence of two years of which six months was to be served in a jail-type institution and the balance suspended. He was placed on probation for two years to commence following his release from confinement, pursuant to 18 U.S.C. 3651.

On January 25, 1967, the petitioner appeared before the Special Grand Jury of December, 1966, for the Southern District of New York, which was investigating how winning twin double tickets were cashed at Yonkers Raceway and Roosevelt Raceway and the possible evasion of payment of income tax on such winnings. (4-6, 36,* GX 1). The petitioner testified he had never received a winning twin double ticket from a Mr. Handel; that he had never distributed

*Numbers refer to the pages of Trial transcript.

to anyone or asked anyone to cash a winning twin double ticket that was either his or someone else's; that he had never received a winning twin double ticket from anyone who asked him to cash the ticket or to give it to somebody else to cash (GX 1, 37, 38, 40).

At the trial the Government called four witnesses, PIPITONE, OPPENHEIM, HOLCOMB and STRAUSS who testified concerning their twin double ticket activities for petitioner.

PIPITONE, a part time taxi driver, testified he attended Yonkers and Roosevelt Raceways nearly every night in the years 1964 and 1965, and that his purpose in going there was to play the horses, and to cash in his name for a commission winning twin double tickets won by other persons (42-44, 88, 95, 100, 101).

He cashed such tickets for 20 to 25 people (101), altogether about $380,000.00 worth of winning tickets and cashed some winning tickets for petitioner and received a commission (52, 53).

OPPENHEIM, an actor, formerly a cab driver, spent most of his time during 1964 and 1965, day and night, cashing twin double tickets in his own name at racetracks, including Yonkers and Roosevelt, to save the actual winner payment of income tax on his winnings (137-139). He cashed in excess of 250 tickets totalling about $2,500,000.00 for other people (139, 172, 179, 180). For three years beginning in 1964 this was the only work he did (52).

OPPENHEIM cashed about 12 winning twin double tickets for petitioner totalling

about $50,000.00 to $60,000.00, and received a commision of 2% (140-144, 147).

OPPENHEIM was convicted of a tax crime arising out of how he reported his income in the cashing of said winning twin double tickets (152,153). Previously he had been convicted in Vermont in 1958 or 1959 of passing a fraudulent check (160), and as a youthful offender for petit larceny (180).

HOLCOMB, a part time laborer since the year 1955, attended many racetracks in 1964 and 1965, including three to six times a week at Yonkers and Roosevelt Raceways. He spent about ten months of each year at various tracks. He bet at the tracks and cashed twin double tickets not owned by him for about 15 persons.

The total amount of the tickets was about $250,000.00 (197-200).

In February, 1964, at Roosevelt Raceway petitioner asked HOLCOMB to cash two winning twin double tickets. After HOLCOMB had identified himself at the proper track window and received the necessary papers to cash tickets at a cashier window, petitioner took the tickets and papers from him and cashed the tickets himself receiving about $4,000.00. Petitioner then went to two different persons and gave them each some money. Later that evening petitioner gave HOLCOMB $400.00 who returned $50.00 to him for arranging the business (207-209).

Subsequently, in 1964 and 1965, HOLCOMB cashed additional tickets for petitioner at Roosevelt Raceway and at Yonkers Raceway for which he received commissions

(209-233, 255). Altogether in 1964 he cashed about 20 twin double tickets for various people (288, 289).

HOLCOMB knew DAVID HANDEL at the racetracks as a horse owner (256). The petitioner once told HOLCOMB that HANDEL would occasionally give petitioner a winning twin double ticket to do with what he wished (259).

HOLCOMB was convicted of burglary and grand larceny in 1953, of burglary and forgery in 1959, and had three earlier misdemeanor convictions. In 1965 he was returned to prison for violation of parole (260, 261). He served prison terms totaling ten years (272), eight years of which since the year 1955 (276). He violated probation once and parole twice and has been imprisoned in twenty six penal insti-

tutions (286-287).

STRAUSS, a chauffeur and IBM Programmer, attended Yonkers and Roosevelt Raceways in 1964 and 1965, about five days a week. He played the horses and cashed twin double tickets won by other persons for a commission. (319-320). He cashed about $200,000.00 worth of tickets for various people. (321). He met petitioner at Yonkers Raceway in the summer of 1964 (323), agreed to cash twin double tickets for him after petitioner stated he would not have to pay any tax on the winnings if he produced losing tickets equal to the winning tickets cashed (327-328), and thereafter cashed winning tickets for petitoner (328-334). Petitioner informed him some of the winning tickets belonged to DAVID HANDEL (335-336).

STRAUSS was convicted of robbery in the

second degree in 1962, and had a misdemeanor conviction in 1966 (341-342).

Petitioner did not testify in his own behalf but pursuant to stipulation a transcript of his Grand Jury testimony was received in evidence (GX 1, 36), and portions of it were read to the jury by the prosecution (37-41).

However, petitioner called five character witnesses to testify on his behalf, of whom two, STERN and SIEGEL, were cross-examined by the prosectuion.

STERN, a lawyer and former Assistant Attorney-General of the State of New York, has known petitioner since December, 1966, and they have mutual friends with whom STERN has had occasion to talk about petitioner's character. His reputation is of the highest nature, and no one impugned

or said anything derogatory about his integrity. (367-368).

BOXER, a lawyer and law secretary to Mr. Justice Dubin of the New York State Supreme Court, Queens County, employed petitioner for about six months as a law clerk from December, 1966 to April, 1968, during which association his character was of the finest. (401).

HILL, a lawyer and former Assistant Attorney General, knew petitioner for about six months as a neighbor living in the same building. Everyone thought highly of him as a good neighbor, cooperative and willing to help on all problems. (403).

SIEGEL, a lawyer, has known petitioner for seven years since they started to attend law school together in September, 1963. The petitioner's reputation at law

school from 1963 to 1966 was unimpeachable. (405).

FRANK, a lawyer and former Immigration Inspector employed by the Department of Justice of the United States , has known petitioner since they attended law school in 1963, travelled to school together from Hempstead, Long Island. He talked with other persons about petitioner's character and demeanor, and his reputation for honesty, integrity and veracity was good. (415)

The cross-examination was directed to whether STERN and SIEGEL had heard:

1. That petitioner had been indicted for conspiracy (370,411).

2. That petitioner had been indicted for five counts of filing false returns with Internal Revenue Service (370).

3. That petitioner had failed to file income tax returns (373).

4. That petitioner had been barred from various racetracks. (372, 373, 410, 411).

The Court permitted the prosecution to cross-examine regarding all these matters except failure to file income tax returns over the objection of petitioner's trial counsel, and refused to grant petitioner's motions for a mistrial. (371, 373).

ARGUMENT

This Court should grant the petition for a writ of certiorari for the following reasons:

1. The decision of the Second Circuit is in conflict with the applicable decisions of this Court, and other United States Courts of Appeals.

2. The rulings of the Trial Court regarding the cross-examination of two of

petitioner's character witnesses, and its failure to properly charge concerning the limited use and purpose of such cross-examination, call for an exercise of this Court's power of supervision in connection with the administration of federal criminal justice.

POINT I

THE RULINGS OF THE TRIAL COURT IN CONNECTION WITH THE CROSS-EXAMINATION OF PETITIONER'S CHARACTER WITNESSES CONSTITUTED PREJUDICIAL ERROR REQUIRING REVERSAL OF THE JUDGMENT OF CONVICTION.

The petitioner was indicted for perjury in that he allegedly unlawfully, willfully and knowingly testified falsely before a Grand Jury when he stated in answer to questions put to him that he had never received a winning twin double ticket from a MR. HANDEL, or anyone, to

cash, and had never distributed such tickets, or his own winning twin double tickets to anyone to cash.

The petitioner did not testify at the trial but his Grand Jury testimony was received in evidence pursuant to stipulation and portions were read to the jury.

Government witnesses, PIPITONE, OPPENHEIM, HOLCOMB and STRAUSS, testified they had received such winning twin double tickets from petitioner, and had cashed them at his request in their own names as winners for a commission.

The credibility of said witnesses was strenuously attacked by petitioner's counsel during cross-examination. None of them had a serious work record. It affirmatively appeared that PIPITONE was a race-

track habitue and horse player, and regularly cashed winning twin double tickets won by others in his name for a commission. OPPENHEIM, HOLCOMB and STRAUSS were not only racetrack regulars, horse players, and winning twin double ticket cashers for actual winners for which they received commissions, but all three had criminal records and convictions for both felonies and misdemeanors.

A sharp issue of fact was thereby created to be resolved by the jury, namely, whether petitioner had testified truthfully before the Grand Jury, or whether the four witnesses for the prosecution, of very questionable background, were telling the truth.

In this posture of the trial after the Government had rested, five character witnesses for petitioner testified that

his reputation was good, of the highest nature and unimpeachable.

Evidence of good character may be sufficient alone for a jury to come to the conclusion that there is a reasonable doubt of defendant's guilt (MICHELSON v. UNITED STATES, 335, U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168; WEEDIN v. UNITED STATES, 380 F. 2d 657, 660 (2 Cir.); JOHNSON v. UNITED STATES, 269 F. 2d 72, 74 (10 Cir.).

However, the effect on the jury of the testimony of petitioner's character witnesses was nullified by the improper cross-examination which the Trial Court erroneously permitted over objection of petitioner's counsel.

It is well settled that the cross-examination of character witnesses about

prior arrests and charges is within the discretion of the Trial Court, but before such cross-examination is allowed the Court should ascertain by a preliminary inquiry outside the presence of the jury the factual basis of the arrests and charges, their materiality, and the prejudice that might result to the defendant as opposed to the probative value of the cross-examination. This procedure was approved by this Court in MICHELSON v. UNITED STATES, supra. It has been followed in many cases including UNITED STATES v. BILOTTI, 380 F 2d 649 (2 Cir.); UNITED STATES v. DIBRIZZI, 393 F 2d 642 (2 Cir.); UNITED STATES v. GIDDINGS, 273 F. 2d 843 (2 Cir.); cert. denied 362 U.S. 971, 80 S. Ct. 955, 4 L. Ed. 2d 900; UNITED STATES v. PHILLIPS, 217 F. 2d 435 (7 Cir.);

WILCOX v . UNITED STATES, 387 F. 2d 60 (5 Cir.); ROBERSON v. UNITED STATES, 237 F. 2d 536 (5 Cir.): GROSS v. UNITED STATES 394 F. 2d 216 (8 Cir.); UNITED STATES v. WOODEN, 420 F. 2d 251 (C.A.D.C.): UNITED STATES v. BLANE, 375 F. 2d 249 (6 Cir.).

The sole probative purpose of such cross-examination is to determine the reliability of the witness to express the community reputation of the defendant. If the probative value is slight as compared to its prejudice to the defendant, then the cross-examination should not be permitted.

As was stated by Judge Burger, now Chief Justice Burger, in SHIMON v. UNITED STATES, 352 F. 2d 449 (C.A.D.C.):

> "* * * * ; the target of the impeachment of a reputation witness is the credibility of the witness, not the prior conduct of the defendant."

If the Trial Court had held a preliminary inquiry outside the jury's presence it would have ascertained that the charges of conspiracy and filing false returns with Internal Revenue Service against petitioner, arose out of the same alleged facts as the perjury indictment for which he was on trial. There were no indictments charging petitioner with additional offenses based upon other alleged happenings which could have or should have changed the community opinion of petitioner.

The Court would have discovered that subsequent to the perjury indictment, there was a second indictment in the United States District Court for the Southern District of New York (68 Cr.975) in Count 1 of which petitioner and DAVID

HANDEL were named as defendants and charged with conspiracy to defraud the United States in determining the tax liability of the defendants and to violate 26 U.S.C. 7206 (2), and government witnesses, HOLCOMB, OPPENHEIM and STRAUSS were named as co-conspirators, and in Counts 2 through 7 of which, petitioner was charged with aiding in the preparation of and presentation of false United States Information Returns Form 1099, in violation of 26 U.S.C. 7206 (2) and 18 U.S.C. 2. There has been no trial pursuant to this indictment.

Why should it adversely affect the reputation of the petitioner in the community that the Government has seen fit to charge petitioner with several crimes in two indictments arising from the same facts?

If the Court had examined said indictment and ascertained the actual nature of these charges, the extreme prejudice to petitioner would have become immediately obvious, and in the proper exercise of its discretion it would have been required not to permit the cross-examination.

The purpose of the cross-examination was not to discredit the testimony of the character witnesses as persons unfamiliar with the reputation of petitioner in the community, its sole permissible legal function, but to support the testimony of the prosecution witnesses, PIPITONE, OPPENHEIM, HOLCOMB and STRAUSS, and by indirection and innuendo, prejudice petitioner and convict him of perjury. The cross-examination comes squarely within

the prohibition of MICHELSON v. UNITED STATES, supra; SHIMON v. UNITED STATES, supra; and AWKARD v . UNITED STATES, 352 F. 2d 641 (C.A.D.C.).

In SHIMON v. UNITED STATES, supra, the Court of Appeals held it was prejudicial error for the Trial Court to permit cross-examination of a character witness as to whether he had heard that appellant had been charged with giving false testimony to a Congressional Committee without also permitting testimony that the witness had heard appellant had been acquitted of said charges.

In AWKARD v. UNITED STATES, supra, the Court of Appeals ruled that cross-examination of character witnesses was improper and prejudicial where it appeared that the witnesses could not have heard of the

arrests referred to, which occurred after one witness had left the community, and after both had lost contact with the defendant.

In TRAVIS v. UNITED STATES, 247 F. 2d 130 (10 Cir.), reversed 364 U.S. 631, 81 S. Ct. 358, 5 L. Ed. 2d 340, a judgment of conviction was reversed where the District Judge permitted cross-examination of a character witness as to whether he had heard that the defendant at a Senate Committee hearing had refused to answer by claiming his Constitutional privilege under the Fifth Amendment.

In UNITED STATES v. WOODEN, 420 F. 2d 251 (C.A.D.C.) the Court of Appeals reversed a conviction for burglary and larceny, holding it would not have been proper for the Trial Judge to allow cross-examination

of a character witness concerning whether he had heard appellant had 20 drunk convictions, because the target of such questions would have been appellant, not the reliability of the witness.

Here the impropriety and prejudice to petitioner were just as great as in the cited cases. The perjury indictment, and the indictment for conspiracy and aiding in the preparation and filing of false United States Information Returns, were cut out of the same cloth and woven out of the testimony of a single set of witnesses, and the charges in the second indictment could not have any separate or additional probative value to test the credibility of the witnesses to state petitioner's reputation in the community. The witnesses were not the real target of

the questions but petitioner himself.

The Trial Judge possibly became aware during the cross-examination that the questions were not proper.

When STERN was asked by the prosecution whether he had heard petitioner had failed to file income tax returns, the Court by its own motion sustained an objection to the question. The attorney for petitioner, at the side bar, moved for a mistrial which was denied. However, the Court admonished the prosecutor: "But you stop this." (373).

Earlier in STERN'S cross-examination, he answered "No" when asked whether he had heard that petitioner was under indictment for five counts of filing false returns with Internal Revenue Service. In response to petitioner's objection to the question the

Court stated the witness answered "No" and did not rule on the objection. (370)

At the side bar petitioner's counsel moved for a mistrial which was denied, but the Court stated to the prosecutor he could not "go into this sort of stuff". (371).

Although the Court informed the Government it could not conduct such cross-examination, it did not so instruct the jury, and failed to grant a mistrial. The jury was not made aware of any impropriety. Perhaps the Court was under the impression that a negative answer to an improper question removed any possible prejudice. This is not the law (AWKARD v. UNITED STATES, supra; UNITED STATES v. GIDDINGS, supra; GROSS v. UNITED STATES, supra; UNITED STATES v. PHILLIPS, supra).

Despite the Court's admonition to the prosecutor not to pursue this line of interrogation with STERN , the witness, SIEGEL, was asked on cross-examination whether he had heard petitioner had been indicted for conspiracy. The objection of his counsel was sustained with the comment by the Court: "Yes, I think we have gone far enough". (411).

This statement was hardly sufficient to inform the jury the question was an improper one. Actually it could have had the opposite effect, namely, that it was entirely proper but that its repetition was unnecessary.

Questioning the witnesses whether they had heard that petitioner had been barred from various racetracks was even more prejudicial than the cross-examination

already referred to, and the application for a mistrial should have been granted (416).

The prosecutor questioned STERN and SIEGEL whether they had heard petitioner had been barred from various racetracks, and over objection the Court permitted the witnesses to answer (372-373, 410-411). They answered in the negative.

The Court itself put the question to SIEGEL: "Have you heard he was barred from any racetrack?", and received a negative answer (411).

It is no reflection on a person's character and reputation even if he has been barred from racetracks. It is not per se a derogatory fact. It certainly is no crime.

Such interrogation is not a proper standard to test the opinions of witnesses about petitioner's reputation (TRAVIS v. UNITED STATES, supra).

However, to the jury, in the posture of this case the racetrack references constituted proof that petitioner indeed had received twin double tickets from winners and had delivered them to PIPITONE, OPPENHEIM, HOLCOMB and STRAUSS to cash, and that he had been barred from the tracks for such activities.

The jury was strongly influenced by this racetrack cross-examination. After the prosecution completed its interrogation of SIEGEL, Juror No. 4 wanted to know whether the witness received any tips on the horses from

petitioner, which the Court put to the witness. When the witness answered in the affirmative, the juror wanted to know whether the tips were any good, which the Court refused to ask (411-412).

After both sides rested a colloquy took place between the Trial Court and both counsel concerning the cross-examination. The Court finally made the comment that after the jury verdict: "Then we might have a hearing on it." (417). This did not cure the prejudicial error. Subsequent to the guilty verdict of the jury, defense counsel renewed all of his previous motions which were again denied (509). Of course, no hearing was held.

The interrogation of the witnesses

about whether they had heard petitioner had been barred from racetracks, permitted the jury to conclude petitioner had already been tried, convicted and punished by racetrack authorities for trafficking in twin double tickets as testified by prosecution witnesses, and therefore must be guilty of perjury as charged.

There was a clear abuse of discretion by the Trial Court in permitting the entire line of cross-examination over objection, and without a preliminary hearing in the absence of the jury, to ascertain whether there was a proper basis for it and whether the prejudice to petitioner as opposed to its permissible probative use required its exclusion.

The District Judge should not have permitted the cross-examination and should have granted a mistrial, and its rulings to the contrary require the granting of this petition.

POINT II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR REQUIRING REVERSAL OF THE JUDGMENT OF CONVICTION BY ITS FAILURE DURING THE TRIAL AND IN ITS CHARGE TO THE JURY TO INSTRUCT THE JURY CONCERNING THE LIMITED NATURE AND PURPOSE OF CHARACTER WITNESS CROSS-EXAMINATION.

The trial record is completely barren of any instructions by the Trial Court to the jury of the limited nature and purpose of the cross-examination of petitioner's character witnesses by the prosecution. No

instructions were given at the time of cross-examination nor in the Court's charge to the jury.

The Trial Judge at no time cautioned the jury that cross-examination of character witnesses is permitted only to test the qualifications of the witnesses to state the community opinion of the defendant, and that its sole use by the jury is to assess whether the witness has the background to properly express such community reputation, and that such cross-examination may not be considered for any other purpose including evidence of the defendant's bad character, his likelihood to commit the crime charged, or his guilt or innocence. (MICHELSON v. UNITED STATES, supra; AWKARD v. UNITED

STATES, supra; SHIMON v. UNITED STATES, supra; UNITED STATES v. BILOTTI, supra, UNITED STATES v. BLANE, supra.

Although petitioner did not testify at the trial his Grand Jury testimony was received in evidence and parts of it were read to the jury. Said testimony was in complete variance with the testimony of the government witnesses that he had dealt in twin double tickets as charged by the prosecution.

Under the circumstances the failure of the Trial Judge to instruct the jury at any time that the sole function of the cross-examination of the character witnesses was to test the reliability of the witnesses to give the community opinion of petitioner,

resulted in the utmost damage to petitioner's defense.

It was prejudicial error not to instruct the jury of the limited nature of the cross-examination because otherwise the jury might improperly consider it for any purpose including evidence of petitioner's bad character, his likelihood to commit the crime charged, and be the basis of a guilty verdict, all of which apparently happened.

Preferably such instructions should have been given at the time of cross-examination and in the Court's charge to the jury. Certainly, the instructions must be explicitly set forth in the Court's charge.

Here the only reference by the Court in its charge to character witnesses was that evidence of good reputation may be considered by the jury together with all other evidence in determining the defendant's guilt beyond a reasonable doubt. (469,470).

Counsel has found no precedent in this Court or in any Court of Appeals including the Second Circuit where a judgment of conviction has been affirmed, absent cautionary instructions by the Court to the jury concerning the limited use and purpose of cross-examination of character witnesses.

The import of the reported cases appears to be to the contrary.

In GROSS v. UNITED STATES, supra, the Eighth Circuit in reversing a

judgment of conviction said at page 221:

> "The errors in not testing the basis for the cross-examination and in allowing the improper hypothetical inquiry were compounded by the failure of the trial court to provide any instruction to the jury concerning the cross-examination, either at the time of such inquiry or in its final charge."

In UNITED STATES v. PHILLIPS, supra, the Seventh Circuit reversed a judgment of conviction where the Trial Court in its charge made no reference to the purpose for which cross-examination of character witnesses was permitted. The Government had tendered an instruction to charge which the Court had found improper. The Government argued in such circumstances the

defendant was foreclosed from any claim of error. The Court of Appeals said at page 444:

> "In the first place, it is doubtful if any instruction could have been given at that late time which would have dissipated the harmful effect of the cross-examination. In the second place, when the instruction was refused by the court because of its form the duty devolved upon the government to tender a proper instruction. Upon its failure to do so, we think it was the duty of the Court of its own volition to instruct the jury as to the purpose for which the cross-examination was permitted as well as the extent to which it could be considered by the jury."

See, also, WILCOX v. UNITED STATES supra, where the Fifth Circuit reversed a judgment of conviction because of

the improper cross-examination of character witnesses, and because of the absence of cautionary instructions by the Court to the jury, despite the failure of defense counsel to request such instructions or to take exception to the jury charge. The Court also held that it was not necessary to apply the plain error rule (F.R.C.P. 52 (b)) because objection had been taken to the cross-examination. The Court said at page 64:

> "This is not the typical situation in which a trial court for want of objection merely acquiesces in the actions of counsel so that the court is never really given an opportunity to rule and for which the court may not fairly be put in error for something which was not expressly called to its attention

> or which, in effect, it had no opportunity to correct."

Similarly, in the instant case, petitioner's Trial Counsel had made numerous objections to such cross-examination and had moved several times for a mistrial although he had made no specific request for cautionary instructions to the jury.

Nevertheless, whether it is argued that the Trial Court was sufficiently apprised of petitioner's position by his objections and motions for a mistrial, or whether the plain error doctrine is applied, the Court was duty bound to instruct the jury at least in its charge, if not on cross-examination, of the limited use

it could make of the prosecution cross-examination.

Because the Court did not so charge, the jury was free to use what it had learned to help find petitioner guilty. The thrust of the interrogation without regard to the answers given, bolstered the Government's direct case. The conspiracy indictment, the indictment for five counts of filing false returns with Internal Revenue Service, and a failure to file income tax returns, and that petitioner had been barred from racetracks, without the limiting effect of proper instructions, inevitably produced a guilty verdict.

POINT III

THE ERRORS COMMITTED BY THE TRIAL COURT WERE OF A SERIOUS AND SUBSTANTIAL NATURE AND NOT MERELY TECHNICAL AND SAID ERRORS DEPRIVED PETITIONER OF A FAIR TRIAL UNDER THE FIFTH AMENDMENT.

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without opinion in open court. It is impossible to authoritively state the basis of the affirmance.

In these circumstances counsel must assume that the Second Circuit accepted the conclusion of the Government in its brief which was as follows:

> "The defendant Elvin was proven guilty by overwhelming, uncontradicted evidence. Questions asked two of his character wit-

> nesses on cross-examination were proper and, in the circumstances of this case, the District Court's failure to give a cautionary instruction regarding those questions, which instruction defendant at no time requested, did not constitute an abuse of discretion. If the Court's failure in this regard was error it was harmless error, not prejudicial of the defendant's right to a fair trial."

However, the errors committed by the District Judge were substantial and not merely of a technical nature. It failed to exclude cross-examination which did not have the probative value required by the decided cases, and the thrust of which were directed against petitioner and not the witnesses. It never instructed the jury that the cross-examination could not be used

by the jury to decide petitioner's guilt but only to assess the reliability of the witnesses.

A conviction should not be permitted to stand where a judge committed errors on such basic issues.

BOLLENBACK v. UNITED STATES, 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350, is squarely in support of petitioner's position, and states at Page 612:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria".

At Page 614 this Court further states:

> "In view of the Government's insistence that there is abundant evidence to indicate that

> Bollenback was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts'.

This trial does not meet the required criteria of BOLLENBACK v. UNITED STATES, supra.

In ROBERSON v. UNITED STATES, supra, the Fifth Circuit reversed a judgment of conviction for errors committed in connection with the cross-examination of character witnesses despite a correct charge by the Trial Court, stating at Page 541:

> "In his final charge to the jury, the learned district judge ably and correctly instructed

> them. We apprehend, however, that it was then too late to cure the repeated errors. Before we can accord entire verity to a verdict of guilty, that verdict must result from a trial fairly conducted in every material respect in accordance with the rules of law, and inadvertently this trial was not so conducted. The judgment is, therefore, reversed and the cause remanded."

The totality of errors by the Trial Court ultimately deprived petitioner of due process of law and a fair trial under the Fifth Amendment.

It is respectfully submitted that the errors of the Trial Court were of Constitutional dimension under the Fifth Amendment and affected the substantial rights of petitioner, bringing it within the doctrine of CHAPMAN v. CALIFORNIA, 386 U.S. 18,87 S. Ct. 824, 17 L. Ed. 2d 705. Nobody is able to

state what prompted this jury to come to the determination it did in view of the serious errors committed. No Appellate Court can state a belief that said errors were harmless beyond a reasonable doubt.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MURRAY E. GOTTESMAN,
IRVING RADER
Attorneys for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1530

ROBERT ELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without an opinion.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1971. The petition for a writ of certiorari was filed on March 31, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in permitting the prosecution to ask petitioner's character witnesses if they had heard that petitioner had been indicted for

other crimes and that he had been barred from various racetracks.

2. Whether, in the absence of a request by defense counsel, the court erred in not conducting a preliminary hearing to determine the factual basis of the government's questions to petitioner's character witnesses.

3. Whether, in the absence of a request by defense counsel, the court erred in not instructing the jury on the nature and purpose of the cross-examination of petitioner's character witnesses.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted under 18 U.S.C. 1621 on one count of perjury in testimony before a special federal grand jury. He was sentenced to six months in prison to be followed by two years on probation. The court of appeals (Lumbard, C. J.; Kaufman and Anderson, JJ.) affirmed from the bench at the conclusion of oral argument.

1. A special grand jury was impanelled in December 1966, to investigate the manner in which certain winning twin-double racetrack tickets were being cashed at Yonkers and Roosevelt Raceways in New York (Tr. 4-6).[1] During 1964 and 1965, various raceways in New York established a pari-mutuel system of betting on horse races known as the "twin-double", under which a player would win by selecting winning horses in each of four races. Initially, a ticket selecting two horses

[1] Tr. refers to the transcript of trial which is on file with the Clerk.

to win respectively in the sixth and seventh races would be purchased by the player. If both horses won, the player would exchange his "live" ticket for another reflecting his choice of the winners in the eighth and ninth races. If successful again, the player could collect $12,000 or more in winnings in exchange for a $2.00 bet (Tr. 8-9, 12).

The scheme uncovered by the special grand jury involved individuals, known as "cashers" or "ten-percenters", who, for a commission, would cash winning twin-double tickets for the actual owners in such a manner that the actual owners could evade the payment of income tax on their winnings (Tr. 109, 139). The "casher" would receive the winning twin-double ticket from the actual owner after the ninth race and go to the cashier's window. He would then complete an information form giving his own name and address and identification, a procedure which was required of all winners over $600; he would then receive the money, which he would turn over to the actual winner less a commission for "cashing" the ticket (Tr. 138-140, 199-200, 319-320). On the basis of the information given at the cashier's window, the racetracks would complete, in four copies, the required Internal Revenue Service Form 1099, notifying the Service that more than $600 had been paid to a winner. One copy of Form 1099 was sent to the Internal Revenue Service, one copy was retained by the racetrack for its files, one copy was sent to the New York State Tax Commission, and another copy was sent to the winner (Tr. 8-18, 29-30, 131-133). This procedure necessarily resulted in many Form

1099's being filed annually under the name of the "casher". In order to evade the payment of income taxes on these "winnings", the "casher", on his individual income tax return for a given year, would show betting losses slightly less than his gains (Tr. 73, 75, 152-153).

2. Petitioner's testimony before the grand jury on January 25, 1967, was stipulated at trial (Tr. 39-40):

> Q. On the winning twin-double tickets that you had, did you ever have anyone else who had an interest in those tickets?
>
> A. No.
>
> * * * * *
>
> Q. Was there ever an occasion when somebody else cashed a twin-double ticket for you that you had an interest in?
>
> A. No.
>
> * * * * *
>
> Q. So we can be perfectly clear, Mr. Elvin, did you ever receive a winning twin-double ticket from anyone and have that person ask you to either cash the ticket yourself or give it to somebody else to cash?
>
> A. No, sir, I didn't.

The undisputed evidence adduced by the government showed that in 1964, petitioner, also known as "Photo Bob", attended Yonkers and Roosevelt Raceways and frequented an area known as the "bullpen", where individuals, contrary to track rules, would buy and sell the first half of the winning twin-double tickets. Four "cashers", Joseph Pipitone, John Oppenheim,

John Holcomb, and Lawrence Strauss, all testified that on various occasions in 1964 they had dealings with petitioner in buying and selling "live" tickets in the "bullpen" at Yonkers and Roosevelt and other raceways, and on many occasions observed petitioner buying and selling winning tickets (Tr. 42-43, 51-55, 72, 141-143, 202-205, 321-324). Oppenheim and Strauss testified that petitioner had asked them to cash tickets he was holding which belonged to one Handel [2] (Tr. 146, 335-336).

3. After the government rested its case, defense counsel called five character witnesses to testify on petitioner's behalf. In addition to testifying as to petitioner's good reputation in his community, two of the witnesses, Stern and Siegel, testified that each had accompanied petitioner to a racetrack. Stern testified that to his knowledge the largest sum of money that petitioner had bet on any single race was $10 (Tr. 368, 406). During the cross-examination of Stern, the following colloquy occurred (Tr. 369-370):

> Q. Mr. Stern, you said you have heard what Mr. Elvin's reputation in the community is, is that correct?
>
> A. Yes.
>
> Q. Your testimony is you have heard that in the community his reputation is good?

[2] Petitioner at the time of trial was indicted with Handel on seven counts charging conspiracy to prepare and submit false tax returns to the Internal Revenue Service and the preparation of the same in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2). Trial has not yet begun on this indictment.

A. Yes.

Q. Have you heard that Mr. Elvin is under indictment for conspiracy?

A. Yes.

* * * * *

Q. Have you heard that Mr. Elvin is under indictment for five counts of filing false returns with the Internal Revenue Service?

A. No.

* * * * *

Q. Have you ever heard that he failed to file income tax returns—

THE COURT: Wait a minute. I will sustain an objection to that.

MR. MILMAN: (Defense Counsel): Your Honor, I object.

THE COURT: I sustained your objection.

After a side-bar conference during which the court indicated that it would permit questioning about whether petitioner had been barred from Yonkers Racetrack, the cross-examination continued (Tr. 372-373):

Q. Have you ever heard that Mr. Elvin was barred from the Yonkers Racetrack?

A. No.

* * * * *

Q. Have you ever heard that he was barred from the Liberty Bell Racetrack?

A. No.

Upon cross-examination of Siegel, the Assistant United States Attorney asked (Tr. 410-411):

Q. Now, Mr. Siegel, you said that you have heard things about Mr. Elvin in the community. Have you ever heard that he was barred from Roosevelt Raceway?

MR. MILMAN: I will object, your honor.

THE COURT: He can ask that.

A. I have never heard that.

Q. Have you heard that he has been indicted for conspiracy?

MR. MILMAN: Objection.

THE COURT: Yes, I think we have gone far enough. I will sustain that objection.

ARGUMENT

1. Petitioner's contention that the trial court abused its discretion in permitting the cross-examination of his character witnesses is without merit. Petitioner argues that the cross-examination was prohibited under *Michelson* v. *United States*, 335 U.S. 469. On the contrary, *Michelson* held that once a defendant has put his character in issue by reference to hearsay testimony as to his reputation in the community, the prosecution may test the accuracy of the evidence by asking other questions regarding actual events "which would probably result in some comment among acquaintances if not injury to defendant's reputation." 335 U.S. at 481. See also *United States* v. *Dibrizzi*, 393 F. 2d 642 (C.A. 2); *United States* v. *Giddins*, 273 F. 2d 843, 845 (C.A. 2), certiorari denied, 362 U.S. 971;

United States v. *Bilotti,* 380 F. 2d 649, 650 (C.A. 2), certiorari denied, 389 U.S. 944; *United States* v. *Silverman,* 430 F. 2d 106, 125-126 (C.A. 2).

Petitioner implicitly concedes that the events brought out on cross-examination occurred (Pet. 28), but argues that, since the indictment in this case, and the then pending indictment charging conspiracy, and the preparation and submission of false information on his income tax returns, all arose out of the same factual context, references to the latter indictment were of no probative value to test the credibility of his character witnesses' testimony concerning his reputation in the community. However, the questions pertaining to the conspiracy indictment properly tested the extent of the character witnesses' knowledge of actual events bearing on his character and reputation. In addition, the questions relating to petitioner's ejectment from various raceways bore as strongly on his "community image" as arrests or accusations. See *Shimon* v. *United States,* 352 F. 2d 449, 453 (C.A. D.C.).[3]

2. The trial court did not conduct a preliminary hearing to determine the factual basis of the questions which were to be put to the character witnesses upon cross-examination. Petitioner argues that this was error. Whether such a hearing was appropriate, the lack of one was not prejudicial since no request for a hearing was made by defense counsel and petitioner implicitly concedes that the questions had a factual basis (see Pet. 28-32).

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[3] Petitioner's challenge to the question regarding his failure to file income tax returns was not prejudicial since the trial judge sustained an objection to the question before it was completed.

3. Although he admits that he did not request cautionary instructions, petitioner contends (Pet. 44) that the court committed plain error in failing to instruct the jury on the limited purpose and nature of the prosecution's questions on cross-examination. In light of the overwhelming evidence of his guilt, the failure so to instruct does not warrant reversal.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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